

## OPD APPELLATE WINS - SEPTEMBER TO DECEMBER 2009

The Appellate Section of the OPD had major wins in the last third of this year.

### CRIMES AND OFFENSES - ELEMENTS

Reversal of convictions for felony murder, robbery, and weapons possession affirmed by the New Jersey Supreme Court. Under the Code, **accomplice liability** requires that a defendant act "[w]ith the purpose of promoting or facilitating the commission of the offense." N.J.S.A. 2C:2-6(c)(1). Defendant could not be found guilty of **robbery and felony murder** unless he shared Davis's intent to commit a theft before or at the time that Davis shot the victim. The prosecutor improperly advised the jury that it could convict defendant of robbery and felony murder solely on the ground that he aided Davis in his escape, even if he did not participate or assist in any way in the attempted robbery. In this case, after Davis fatally shot Hernandez, the first-degree robbery had occurred. Unless defendant intended to promote or facilitate the theft committed by Davis before or at the time of its occurrence, defendant is not a culpable party to the robbery. Defendant cannot be held liable as an accomplice to a robbery solely based on his conduct after Davis had already robbed and fatally wounded the victim. If defendant lacked the specific intent to commit the theft but instead intended only to assist in hindering Davis's apprehension, defendant would be guilty only of the crime of hindering. (State v. Quadir Whitaker, December 7, 2009; Kevin G. Byrnes, Designated Counsel)

Conviction for **endangering the welfare of a child** reversed, other convictions affirmed by the Appellate Division. Under the facts presented at trial, the conviction for endangering an injured victim cannot be sustained, because, as the State acknowledged, the victim was either already dead, or at a minimum unable to be saved, at the time he left her apartment. Here, the expert witness testimony established that Rosetta was "essentially medically dead" in the "very early" stages of the attack. In fact, the assistant medical examiner opined that the first wounds stopped Rosetta's heart. The evidence adduced clearly showed that Rosetta was dead before defendant left the scene. (State v. Eugene M. Wilson, October 6, 2009; Susan Brody, A.D.P.D.)

### CUMULATIVE ERROR

Conviction reversed by the Appellate Division because of errors, individual and collective, all stemming from or made more prejudicial by the testimony of Officer Chopek, who took defendant's statement impermissibly interfered with the jury's ability to independently weigh credibility. The State's case rested primarily upon the testimony of Davila, an individual with a significant criminal history. The State also had available the wire recordings and defendant's own taped statement as additional proof. The body wire conversations, however, were at best difficult to understand; the jury did not listen to the tapes during their forty-five minute deliberation. In his self-serving recorded statement, defendant attempted to explain away the import of his conversations with Davila. Chopek's testimony, therefore, became pivotal. And he vouched for Davila's credibility, and attacked the credibility of defendant's version of events. Chopek presented himself as more of an expert witness than a fact witness, by endorsing Davila's testimony as believable and casting aspersions on defendant's credibility. As he told the jury, "the proof is also my credibility and what I heard." Defendant also contended that the court should have cautioned the jury to scrutinize the recorded conversations with great care because of both the audibility problems and Chopek's characterizations. In this case, where no transcript was provided to the jury, and where they heard the poor-quality recording only once, an instruction about the unreliability of the spoken word might have been helpful to the jury. In light of Chopek's endorsement of Davila's credibility, his characterization of defendant's statements as nothing more than "spin," and his comments about defendant's intent based on his recollection of the recorded conversation, the omission unfairly contributed to the verdict. Defendant also sought to compel the State to redact references to domestic violence and references to Stiles's accusation that he molested their child. The references to domestic violence and child molestation were highly prejudicial, and not necessary in light of the other equally probative and less prejudicial evidence available. They should have been excluded, as the probative value was significantly outweighed by the potential prejudice to defendant. Although the court did give the jury a limiting instruction as to the alleged domestic violence, the court merely said that the jury should not assume that defendant had been charged with domestic violence simply because confrontations occurred. The judge did not tell the jury that they could not use this evidence in order to find defendant had a propensity towards violence and was therefore more likely than not to have committed the crime. The judge did not explain to the jury that just because of these past conflicts, they could

not conclude that defendant had a propensity to violence. Finally, In his summation, the prosecutor pointed out that this was not a victimless crime. He said that for the rest of her life Stiles would have to live with the knowledge that "when that doorbell rings," it might not be police officers, but rather, "Davila or someone just like him. A career criminal that wants money and someone has offered it to him." The prosecutor impermissibly shifted the focus away from whether the State had met its burden of proof to establish the statutory elements beyond a reasonable doubt, to the need to protect the victim from further harm in the future. This shift in focus is improper. In the context of a trial in which a police officer vouched for his own credibility and that of the State's principal witnesses, as well as expressed his disbelief of defendant's taped interview, the prosecutor's argument that the jury should convict defendant in order to protect the victim in the future warrants a new trial. The inflammatory notion that a conviction was necessary to protect the victim had the capacity to produce an unjust result. (State v. Thomas Stiles, November 18, 2009; M. Virginia Barta, A.D.P.D.)

#### **DISCOVERY**

Convictions reversed by the Appellate Division after a careful review of the record including the discovery disclosed that certain withheld documents were relevant and probative, and the failure to provide such discovery required a reversal and remand for a new trial. It was not possible to determine from this file whether Smith, Bunch or Barber were paid informants. However, an examination of that file shows that, contrary to the State's representations that none of the sealed information pertained to any trial witness, the file contains numerous pages of documents regarding Bunch and Simpson. Those include the report of an interview that Bunch provided to police in 1993 and Simpson's juvenile record. These documents, in particular, were directly relevant to the credibility of the statements that Bunch and Simpson provided to the police implicating defendant in this homicide. Moreover, the file of sealed documents includes many other pages related to defendant's role in this crime, for example, the complaint against him. The resolution of the 1983 charges against Simpson is unclear. But whether they were still pending or had been resolved, they were relevant to the credibility of Simpson's 1984 police statement that implicated defendant in this crime. His arrest as the shooter in a similar crime not long before this one provided a motive, in addition to the charges he faced for Peaches's killing, for him to tell the police that defendant wielded the gun this time.

See also LESSER INCLUDED OFFENSES. (State v. Brian Wilson, September 10, 2009; Michael C. Kazer, Designated Counsel)

### DOUBLE JEOPARDY

The Appellate Division affirmed defendant's conviction for weapons possession, but reversed defendant's motor vehicle convictions for the seven moving traffic violations on August 12, 2004 based on collateral estoppel principles. The only rational explanation for defendant's acquittal on the eluding charge was that the jury did not find defendant was the driver of the Acura on August 12, 2004. Under these circumstances, the trial judge was precluded from finding that defendant was the person who was driving the Acura on August 12, 2004. (State v. Dazhon Godwin, September 3, 2009; Monique Moyes, Designated Counsel)

### EVIDENCE

Convictions reversed by the Appellate Division. On appeal, defendant claimed that it was **error to permit cross-examination of his expert, Dr. Weiss, by use of hearsay upon which the expert did not rely**. This hearsay consisted of the statement given by Walter Jones recounting what he had been told by defendant in the early morning after the fire, including defendant's threat to kill his girlfriend. The hearsay also included reports of prior acts of violence referenced in defendant's medical records. In the present case, Dr. Weiss reviewed Jones's statement and considered it in reaching his conclusions, but did not rely upon it. The judge's determination to permit cross-examination, nonetheless, resulted in the introduction of hearsay that the jury was otherwise not permitted to hear, thereby denying defendant his constitutional right of confrontation. In contrast to Dr. Weiss, Dr. Atkins, the State's expert, testified that the statement of Walter Jones was "very important" to him in rendering his opinion. Nonetheless, defense counsel objected to the prosecutor's use of Jones's statement, arguing that the prejudicial effect of the admission of its contents outweighed its probative value. In the present matter, a Rule 403 analysis was rejected by the trial judge who, apparently relying on his prior mistaken ruling that the use of the Jones statement would be permitted in connection with the cross-examination of Dr. Weiss, determined that such analysis was no longer warranted because the objected-to hearsay was already before the jury. Defendant's hearsay admissions to Walter Jones, as contained in Jones's statement to the police, should never have been brought to the attention of

the jury in the absence of testimony by Jones, himself, at trial. Further, the judge's combined errors in permitting the use of this double hearsay violated defendant's right to confrontation and deprived him of his right to a fair trial. (State v. Curtis Daryl Cooper, October 8, 2009; Ingrid A. Enriquez, Designated Counsel)

Conviction reversed by the Appellate Division. At trial, Detective Rios testified regarding the unreviewed and unsigned confession to robbery and murder given by defendant following his surrender to the police. On appeal, defendant argued that the trial judge committed **plain error when she allowed his statement to be admitted in evidence and twice circulated to the jury**. N.J.R.E. 803(c)(5) permits the recollection of a witness to be refreshed by a writing made at the time when the fact recorded actually occurred. When the witness does not remember part or all of the contents of the writing, the rule permits "the portion the witness does not remember [to be] read into evidence." However, it "shall not be introduced as an exhibit over objection". Defendant did not fully acknowledge the correctness of his statement. While the evidence in this case against the defendant was strong, the jury experienced significant difficulty in reaching a verdict, requiring extensive read-backs of testimony and at one point stating that a unanimous verdict could not be reached. In these circumstances, it cannot be determined what influence the written confession, shown to the jury at trial and given to them for use in their deliberations, might have had. (State v. Michael Gore, Jr., October 26, 2009; Marcia Blum, A.D.P.D.)

Conviction for terroristic threats reversed by the Appellate Division. The improper admission of defendant's letters threatening to sue CSP as well as other fundamentally irrelevant testimony about defendant's threats to file lawsuits against DeCamp and Zoyac may have confused the jury. It was error to admit the letters to rebut a claim of mistake, under **N.J.R.E. 404(b)**, because the defense made no such claim. Nor were the threats to file lawsuits otherwise relevant. Indeed, rather than focusing its case on the events of December 18, 2002, the prosecution placed before the jury prejudicial and irrelevant evidence designed to show that defendant was angry and difficult to deal with. See also **JURY INSTRUCTIONS**. (State v. Anthony Parisi, December 18, 2009; Rasheedah R. Terry, Designated Counsel)

#### **GUARDIANSHIP/TERMINATION OF PARENTAL RIGHTS**

Order terminating parental rights reversed, case remanded by the Appellate Division. The trial court's decision contained insufficient and inaccurate factual findings with respect to the four prongs of N.J.S.A. 30:4C-15.1(a). In particular, DYFS failed to obtain a bonding assessment with the child's foster parents before concluding that termination would not do more harm than good. The absence of any evidence that DYFS made any effort to investigate and assist defendants in addressing whatever problems caused them to lose their housing negated the finding that it made reasonable efforts to provide services to defendants. (DYFS v. M.D.C. and R.C./In the Matter of B.M.C., December 9, 2009; Michael C. Wrobleski, Designated Counsel, for M.D.C.; Durrell Wachtler Ciccio, Designated Counsel, for R.C.; Jeffrey R. Jablonski, A.D.P.D., Law Guardian)

The judge in this Title 9 action defaulted a defendant because she did not attend the factfinding hearing even though her attorney appeared to represent her interests. The Appellate Division concluded that, unless warranted by defendant's failure to comply with a prior order and the potential for default was adequately noticed, a judge is not authorized to enter a default in this circumstance. A default based upon the failure to comply with an order requires as a predicate that the defendant received adequate notice that default may follow a failure to comply. The prior order did not indicate that defendant would be defaulted if she failed to appear for the factfinding hearing. Moreover, even if it were possible to parse the language of the prior order in a way that would suggest otherwise, a court should not enter default when fundamental fairness counsels against it. The Division relies upon N.J.S.A. 9:6-8.42, which declares that "[i]f the parent or guardian is not present, the court may proceed to hear a complaint under this act only if the child is represented by a law guardian." Proceeding in a party's absence is not the same as entering default. As the judge declared in entering default here, defendant was precluded from putting on "an affirmative case." What the judge meant by this was not defined, but the common understanding attributable to this phrase would suggest that the default barred defendant from calling witnesses or offering other evidence. Such a ruling was not authorized or remotely suggested by N.J.S.A. 9:6-8.42. However, because the default had no meaningful impact, the Court affirmed the ultimate judgment. (DYFS v. P.W.R., L.C., AND C.R., Jr./Matter of A.R., November 19, 2009; Mary Potter, Designated Counsel; Melissa R. Vance, A.D.P.D., Law Guardian)

Order terminating M.Y.'s parental rights to his biological

daughters and placing the children in the guardianship of DYFS for adoption by M.S., their maternal grandmother, reversed by the Appellate Division. Factors such as the trial judge's conclusion that he was unable to accept or reject the conflicting expert opinions on whether termination of parental rights will not do more harm than good, the absence of support for the finding that M.S. would not agree to continue as a placement for the children if she was unable to adopt them, and the fact that the children have bonded with their parents and have expressed a desire to live with them, the panel require remands for further proceedings. DYFS has failed to prove by clear and convincing evidence that termination of parental rights will not do more harm than good. (DYFS v. M.Y. and E.Y./In the Matter of N.Y. and P.Y., October 22, 2009; Richard Sparaco, Designated Counsel; Christopher A. Huling, A.D.P.D., Law Guardian)

### **GUILTY PLEAS**

State v. Lawrence Speed, unpublished opinion, App. Div. Docket No. A-5912-07T4 (December 15, 2009) - Conviction reversed, case remanded. "Speed's response to the question 'what if anything did you do that makes you guilty of endangering the welfare of a child' was not sufficient to satisfy the requirement that he admit to knowledge, at the time of the offense, that his conduct would 'tend to impair or debauch' the victim's morals. He admitted to sexual intercourse, but not to knowing that the conduct would tend to impair the victim's morals at the time of the offense. Consequently, there was an inadequate factual basis for the plea." (Ingrid A. Enriquez, Designated Counsel)

### **IDENTIFICATION**

Defendant contended that the trial court erred in admitting the victim's out-of-court identifications of him because they were unduly suggestive, and that they tainted the victim's in-court identification at trial. The Appellate Division remanded for an evidentiary hearing as to the "show-up" identification. J.S. testified at the Wade hearing that Officer Larrison told her "the dogs had gone from my house and had led them to his house." There was no need for the police to share that canine-tracking information with the victim before she was driven to defendant's house. Once at defendant's house, J.S. saw only defendant and two uniformed police officers, illuminated by Officer Larrison's spotlight. This physical arrangement also has inherent suggestive aspects. Defendant was the sole civilian

standing near two police officers, illuminated only by the light of a police car. Even though J.S. stated that she was not pressured by any police officer to make a positive identification, the dog-tracking statement to her, coupled with the physical setting of the show-up and the surrounding scene, raises significant concerns about the reasons for her certitude. Given the difficulty of this issue, the evolution of the law following this trial, and the poorly-developed record here concerning any deviations from the Guidelines, the most prudent course was to remand the show-up issue to the trial court. (State v. Jason R. Farley, November 20, 2009; Alison Perrone, Designated Counsel)

### **INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)**

Denial of PCR reversed, case remanded for new hearing by the Appellate Division. The paramount issues are whether defendant's defense counsel not only provided defendant with constitutionally deficient advice concerning the direct or indirect Megan's Law consequences that he faced if convicted pursuant to the plea bargain, but also whether he suffered prejudice even if he was misinformed. It is the second prong of this framework that suffers from an unfinished analysis, and which impels the order of remand. The issue here is not that defendant failed to understand that he was subject to Megan's Law. Rather, it is defendant's stance that he was misinformed as to the extent of his exposure to a tier reclassification by pleading guilty, which was unfortunately compounded by the court's statement at sentencing that "I don't think you're subject to Megan's Law anyhow, so that's not a concern right now." This statement, albeit accurate insofar as the immediate criminal sexual contact charge was concerned, would lead a person in defendant's circumstances to reasonably believe that the new conviction would have no impact whatsoever on his extant Megan's Law status. The absence of any comment by defendant's defense counsel, either to clarify the sentencing judge's statement on the record or to consult privately with defendant and advise him otherwise, reinforced the potential for misapprehension. Given the significance to all concerned – the defendant, the State, and the community – of tier classifications, it cannot confidently be determined that defendant did or did not receive the effective assistance of counsel when he acceded to the plea agreement and fulfilled his part of the plea bargain. That the effect of that event was not felt until several months later, when defendant's tier classification was reviewed and increased, does not detract from our uneasiness with the truncated process that defendant



received in January and February 2006. The PCR judge must conduct a limited further hearing, with or without testimony in his discretion, to explore whether defendant should be entitled to withdraw his guilty plea. (State v. R.E., December 4, 2009; Richard Sparaco, Designated Counsel)

Denial of PCR reversed, convictions reversed by the Appellate Division. Defense counsel's decisions not to cross-examine the victims about their alleged recantation or their mother about their recantation, and her decision to call as a witness defendant's new fiancée were not well-reasoned, strategic decisions made after adequate investigation and preparation. Trial counsel's performance was deficient under the Strickland/Fritz standard and defendant has demonstrated prejudice. At the PCR hearing, counsel reiterated several times that she believed C.J. "backtracked" regarding her opinion of the girls' veracity and that made her reluctant to question her further about the truthfulness of her daughters. Counsel reached this conclusion based upon 1) a single, allegedly unexpected answer, i.e., that Y.A. and N.G. had only lied about having boys in the house; and 2) the subsequently-shown mistaken belief that counsel had elicited this testimony from C.J. at a pre-trial hearing. The State's proofs were by no means overwhelming. Y.A. and N.G. testified as to defendant's alleged conduct, but there was little cross-corroboration. Neither one witnessed the alleged behavior of defendant toward the other, except to describe, in general terms, the favorable treatment Y.A. received from defendant. Once defendant testified in his own defense, however, the jury had two sets of allegations, each directly opposite from the other, to consider. The jury's decision turned upon credibility. (State v. A.J., October 5, 2009; Peter B. Meadow, Designated Counsel)

Denial of PCR reversed, case remanded for evidentiary hearing by the Appellate Division. Defendant may have been deprived of the effective assistance of counsel when his attorney insisted that a detective employed by the prosecutor's office remain in the jury venire. The detective eventually served on the jury, which convicted defendant. The detective was employed by the office that was prosecuting this defendant and the detective knew the arresting officer, whose credibility was a key issue. The judge, as he indicated would undoubtedly have sustained any defense objection to the detective being in the venire. Although the record on appeal is not complete, a defense objection or application at any stage during jury selection would have undoubtedly required the detective's exclusion from the jury. However, the limited record on appeal

reveals that defense counsel was insistent on the detective remaining in the venire and was quite willing to allow the detective to take a seat on the jury and deliberate on defendant's guilt. In the only clear statement in the record on appeal as to defense counsel's tactic regarding the detective, which was quoted earlier, she only indicated that she "couldn't make that determination now" but insisted that he remain in the venire. Thus, there is nothing in the record on appeal that would reveal whether defense counsel had made a sound strategic decision in insisting that the detective remain in the venire and in allowing him to ultimately sit on the jury. (State v. Fuquan Morgan, November 2, 2009; Philip Lago, Designated Counsel)

### JURY INSTRUCTIONS

Conviction for **terroristic threats** reversed by the Appellate Division. Errors in the charge on N.J.S.A. 2C:12-3a, although not the subject of an objection at trial, constituted plain error requiring reversal of the conviction and re-trial. The State's case under both subsections 3a and 3b was premised on defendant's alleged threat to kill DeCamp. The State did not argue that defendant was guilty because he cursed at DeCamp or pounded on the hood of her van, and neither of those actions are "crimes" that would support a conviction under subsection 3a. Nor did the judge explain to the jury the elements of "assault." Further, in defining N.J.S.A. 2C:12-3b, the judge told them it was "different" from 3a because 3b required a threat to kill. Consequently, the jury very well may have concluded that it did not need to find a threat to kill in order to convict defendant under 3a. See also **EVIDENCE**. (State v. Anthony Parisi, December 18, 2009; Rasheedah R. Terry, Designated Counsel)

Convictions reversed by the Appellate Division, dissent by Judge Espinosa, because defendant's right to a fair trial was prejudiced by the court charging the jury with **intoxication** as possibly negating an element of the crime, over defendant's objection. In summation, the defense took the position that defendant did not commit the offenses and focused primarily on seeking to impugn the credibility of L.T. and his mother, including noting inconsistencies in the child's testimony and her conviction for child endangerment. Counsel also commented generally on the problems inherent in the police interrogation that was only partially audiotaped and noted Hunsinger's suggestion to defendant that he was drunk. An intoxication defense was not asserted explicitly or implicitly. The facts of the present case do not clearly indicate a rational basis for

the conclusion that defendant suffered from such a "prostration of faculties" as to render him incapable of forming the requisite mental state to commit the crimes. Not only did the facts not clearly indicate the appropriateness of the intoxication charge, but the instruction impermissibly interfered with defendant's chosen trial strategy as clearly articulated to the court during the charge conference. Our courts have expressed a general need to refrain from interfering with defense counsel's strategy. (State v. R.T., December 17, 2009; Michael Confusione, Designated Counsel)

Conviction for **attempted criminal trespass** reversed by the Appellate Division because the court's charge on the offense of attempted criminal trespass was insufficient. The trial court did not include a reference to the necessity of the offense having been committed in a dwelling, an essential element of the fourth-degree offense of criminal trespass. The statutory definition of structure that the trial court did provide to the jury, taken from N.J.S.A. 2C:18-1, includes all structures and **does not make the distinction between a dwelling and other structures** essential to the degree of trespass in N.J.S.A. 2C:18-3a. Absent a finding by the jury that this offense involved a dwelling, defendant could not be convicted of a fourth-degree crime; the offense would be a disorderly persons offense. The most that may be gleaned from the jury's verdict is that they found him guilty of attempting to commit a disorderly persons offense. Our criminal code, however, does not recognize such an offense. (State v. Michael A. Walker, November 5, 2009; Michael C. Kazer, Designated Counsel)

First degree robbery conviction reversed by the Appellate Division. The State prosecuted Watts solely on an accomplice liability theory, contending that he willingly participated in the crime with Caldwell and that he shared a common purpose and intent with Caldwell to commit an armed robbery against Singh. However, the State alternatively took the position that, even if Watts did not learn that Caldwell committed this armed robbery until Caldwell returned to the car with the money, by driving Caldwell away from the scene, he could have formed the requisite intent and purpose at that time to make him an accomplice to the armed robbery. Over defense counsel's objection, the judge answered "yes" to the question, "[c]an the purpose become apparent at any point of the robbery?" The judge's answer to the jurors' questions allowed the jurors to find Watts guilty as an accomplice of armed robbery based upon a finding that Watts' participation in the crime did not begin until Caldwell returned to the car and Watts then first learned that Caldwell committed

the robbery. In those circumstances, any such conduct by Watts in driving the getaway car could not result in accomplice liability for the crime Caldwell committed by his own conduct. (State v. Timothy Glenn Watts, December 4, 2009; Michael Confusione, Designated Counsel)

Because the jury instructions regarding accomplice liability were inaccurate and misleading, the Appellate Division reversed and remanded for a new trial. The State's theory of the case was that defendant and the unknown assailants acted in concert with each other and shared a common purpose to commit an armed robbery of Jiminez, to commit carjacking against him, and to possess a weapon, the metal bar, for the unlawful purposes set forth in the indictment. The State also theorized that defendant and the others conspired to commit the robbery. It is notable that at the charge conference, it was the State, not defendant, that requested that lesser-included offenses be charged. By making the proposal, the State acknowledged its recognition that, under its theory of the case, if Jiminez was believed, at least one of the perpetrators committed a first-degree armed robbery, but one or more of the others, including defendant, might have participated in the criminal episode with a lower degree of culpability depending upon their conduct and intent, making them guilty of only a lesser offense. Nowhere did the judge instruct the jury that even if one or more of the perpetrators other than defendant committed a first-degree armed robbery against Jiminez, defendant could be found guilty of one of the lesser-included offenses if the jurors were not convinced beyond a reasonable doubt that defendant himself engaged in conduct and acted with a purpose to commit that armed robbery. Instead, the instructions had the capacity to mislead the jury into believing that accomplice liability required a commonality of intent and purpose between the accomplice and principal. In going through each of the lesser-included offenses to first-degree robbery, the judge did not make any mention of accomplice liability principles and how defendant could have been guilty of one of those lesser-included offenses even though one or more of the other perpetrators may have been guilty of any one or more of the greater offenses. (State v. Anthony Wilson, November 24, 2009; Karen E. Truncale, A.D.P.D.)

#### **LESSER INCLUDED OFFENSES**

Conviction for kidnapping reversed by the Appellate Division because the trial court erred in giving the jury no alternative but to find defendant either guilty or not guilty of kidnapping. Neither attorney requested a jury instruction on a

lesser-included offense under the kidnapping count, but the evidence here unquestionably called for a charge on **criminal restraint**. Here, the evidence clearly allowed the jury to find defendant not guilty of kidnapping but guilty of criminal restraint. The jury could have determined that the confinement of the victim was not for a substantial period as that phrase has been explained, or that defendant's purpose in confining his wife was not to commit further assaults or to inflict further bodily injury on her. At the same time, the jury could have determined from the evidence that defendant restrained his wife unlawfully in circumstances exposing her to risk of serious bodily injury, or held her under circumstances resulting in her belief that she was required to remain in the apartment, thus meeting the statutory definition of involuntary servitude. If the jury had reached those determinations from the evidence, the proper verdict would have been not guilty of first-degree kidnapping but guilty of third-degree criminal restraint. (State v. Rolando Betancourt, November 30, 2009; M. Virginia Barta, A.D.P.D.)

Convictions reversed by the Appellate Division because the court denied defendant's request for jury instructions on the lesser-included charges of **manslaughter** and instead instructed the jury only on knowing and purposeful murder. Although defendant's request was equivocal, the judge should have instructed the jury on the lesser-included charges. This was not a case where defendant claimed that he was not present and had no involvement in the crime. Given defendant's concession and his defense, his degree of culpability necessarily was at issue. There was evidence in the record from which a jury could conclude that there was a plan to harm, but not necessarily kill, Newmones in retaliation for the sale of fake drugs to Parker's mother. Although defendant's involvement in the crime was indisputable based on his concession, both the extent of his involvement and his state of mind were at issue. Given that defendant admitted his presence at the scene, the absence of the lesser-included charges, especially without an instruction on accomplice liability, left the jury with no way to consider a result clearly indicated by this evidence: that defendant was involved in the shooting but had a less culpable state of mind than the actual shooter. The jury also should have been allowed to consider whether defendant had shot Newmones but without the intent to kill. See also **DISCOVERY**. (State v. Brian Wilson, September 10, 2009; Michael C. Kazer, Designated Counsel)

#### **POST-CONVICTION RELIEF (PCR)**

Denial of PCR affirmed in part, reversed in part, remanded for evidentiary hearing by the Appellate Division. Defendant's second petition for PCR was based on the absence of defendant's mother or stepmother from the interrogation following his arrest during which he admitted his participation in the kidnapping, sexual assault and murder of a young mother. Defendant argued that his mother's attendance was required and that she was barred from the interrogation room. He contended he was entitled to an evidentiary hearing to determine the credibility of his stepmother's recently submitted statement and her recollection of the events and their relevance to the voluntariness of his oral and written statements. He further argued that his attorney was ineffective because he did not raise the issue of the stepmother's absence from the interrogation and the voluntariness of defendant's statements. In this letter, defendant's stepmother relates that she brought defendant to the police station, they entered a room and a detective handcuffed defendant. In her letter, she states she left the room to use the bathroom. When she returned, defendant was in an interview room being questioned. A detective would not let her enter the room. When she protested, she was shown a note from defendant that stated that he did not want her to be with him. When she insisted that she wanted to see defendant, a detective opened the door. She described his skin as "a fire red in color" and that he looked scared. Deborah Carter Tobin did not testify at the April 1992 Miranda hearing. Although defendant's interrogation could proceed in the absence of his stepmother, police were required to conduct the interrogation with utmost fairness and in accordance with the highest standards of due process and fundamental fairness. If defendant's stepmother was excluded by detectives and defendant was not informed that she was nearby, these circumstances might suggest that the interrogation was not conducted with care and that the juvenile's will was overborne. The record of the facts and circumstances surrounding defendant's stepmother's absence is now disputed. The contradictions created by the stepmother's letter cannot be resolved by simply comparing the facts related in her letter and the transcript of the April 1992 Miranda hearing. (State v. Lawrence Bell, November 17, 2009; David A. Gies, Designated Counsel)

Denial of PCR reversed, case remanded for evidentiary hearing by the Appellate Division. The judge clearly erred in failing to consider any of the issues raised by defendant pro se. Those issues, trial counsel's alleged failure to request a theft-by-deception charge and failure to mold the charge to the facts where two objects were allegedly taken, are not

insubstantial. The claim that appellate counsel was ineffective in failing to raise them exempts them from any procedural bar and requires a remand for an evidentiary hearing at which both trial and appellate counsel must testify. The judge had no factual record before him to support his conclusion that counsel's failure to object to the prosecutor's opening and closing remarks was a tactical decision on her part. Such a finding can only be made based on testimony of trial counsel, which is notably missing. Neither can it be inferred from the fact that she objected once during the prosecutor's opening statement and once during his closing argument. This baseless finding undermines the PCR judge's conclusion that defendant failed to show his counsel's decision undermined the reliability of the trial. As a consequence, this issue must be remanded for an evidentiary hearing at which trial counsel must testify and the judge must then reconsider his decision. (State v. Terrance Cooper, October 19, 2009; Michael Confusione, Designated Counsel)

Denial of PCR reversed by the Appellate Division, case remanded for evidentiary hearing. The Law Division determined that defendant could not possibly prove her allegations of ineffective assistance of counsel because she was deported and could not return to testify. Her deportation was allegedly a result of being convicted of the crime from which she sought relief. Defendant's written submissions established a prima facie case warranting an evidentiary hearing. The PCR court must assume contested facts most favorably to defendant and determine whether those facts would entitle defendant to relief from the conviction if they are true. In this case, defendant Creque certified that her prior attorney told her the guilty plea would not affect her immigration and residency status. To establish the second part of the Strickland test, she also certified that she would not have pleaded guilty if she knew she might be deported. If true, those facts establish a prima facie case of ineffective assistance of counsel. The court's legal error was in viewing the preliminary ruling of whether defendant had established a right to an evidentiary hearing as a conditional ruling. Because defendant showed a prima facie case of ineffective assistance, she is entitled to an evidentiary hearing, and the court should have so ruled and scheduled a hearing. At that hearing, defense counsel will have the burden of presenting sufficient evidence, with or without defendant, to prove her entitlement to relief. Nothing in our court rules requires that defendant be present for a PCR hearing." (State v. Sarah Creque, November 12, 2009; Adam W. Toraya, Designated Counsel)

Denial of PCR reversed, remanded for evidentiary hearing by the Appellate Division. One of the issues defendant raised in his petition was his allegation that his trial counsel had been ineffective for failing to raise his intoxicated state at the time of the shooting as a defense. He included with his petition certifications from his brother Dante McCargo and his friend Arnold Lyles, as well as his own certification, detailing the amount of alcohol he had consumed. In his certification, defense counsel stated that he left it to his co-counsel to discuss the question of intoxication with defendant since co-counsel was to conduct defendant's direct examination. If an allegation of ineffective assistance of counsel is to fail because of a strategic choice made by counsel, there should be a showing that, indeed, counsel considered the issue and selected one avenue of defense over another. There would be many sound reasons for trial counsel to have elected not to pursue an intoxication defense in this matter, but it is not possible to conclude from this record that such an election was in fact made. Because there is no record on this question, it is uncertain whether it is entirely devoid of merit or whether defendant is entitled to further relief. (State v. Victor McCargo, November 16, 2009; Patricia Drozd, Designated Counsel)

#### **SEARCH AND SEIZURE**

Suppression of evidence affirmed by the Appellate Division. Defendant's vehicle was lawfully stopped as the result of defendant's motor vehicle violations, and that defendant's detention in connection with the stop, albeit a seizure, was permissible. However, **independent grounds for the stop and subsequent investigation did not exist as the result of the confidential informant's uncorroborated tip**, and that fact is dispositive in this case because it transformed what otherwise would have been an investigation permitted by Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968) into one that was not. The tipster's veracity, reliability and the basis for his knowledge that illegal activity was to occur were largely conjectural. The uncorroborated information provided by the tipster regarding the appearance of the car and its occupants and regarding the car's destination were benign and insufficient to establish the constitutionality of an investigative detention under Terry. As a consequence, a stop based solely upon the information provided by the confidential informant in this case would have been unconstitutional. There is no legal support for a claim that, because the stop could be independently justified, during its course it was



constitutionally permissible for the police to conduct an unrelated drug investigation of defendant's alleged drug-related activity. (State v. Brian Crammer, September 15, 2009; Stephen W. Kirsch, A.D.P.D.)

Suppression of evidence affirmed by the Appellate Division. The trial judge concluded that the police-citizen encounter at issue here was an **investigatory stop**, for which reasonable suspicion of criminal activity was required, and was not merely a field inquiry. The judge concluded that the **uncorroborated anonymous tip upon which police relied did not satisfy the reasonable-suspicion standard**, and he therefore granted defendant's motion to suppress. Judge Kracov observed the manner in which the detective testified, identified inconsistencies in that testimony, and assessed whether the testimony was reasonable and "comports with common sense and reasonable life experiences." Only after doing so did he reject the detective's testimony as lacking credibility. Because the encounter was an investigatory stop, a reasonable suspicion of criminal activity was required. Because the encounter was an investigatory stop, a reasonable suspicion of criminal activity was required. Because police conducted no investigation and made no observations of any conduct even remotely suggestive of criminal activity before directing defendant to exit the bar, the only possible basis for a finding of the "reasonable suspicion" requires lies in the anonymous tip. No such independent investigation or corroborative effort was undertaken, and therefore the investigatory stop at issue here was based upon nothing other than the uncorroborated anonymous tip. (State v. Ronnie Rosado, September 28, 2009; Stefan Van Jura, A.D.P.D.)

Conviction reversed, suppression ordered by the Appellate Division. The State justified the warrantless entry of the police officers into the first-floor apartment as a part of their community caretaking function. However, the motion judge found that the police's community caretaking function arose only after they observed the open door to the first floor apartment – an observation necessarily made from the building's hallway, since the judge found that the building's owner, Martin, was unable to see the doorway from her vantage point at the entrance to the residence. Nothing in the record suggests that the police had any authorization to enter the hallway, either from Martin or from a first-floor resident. Their presence in that hallway thus violated the Fourth Amendment. The **State failed to meet its burden of proving that it was reasonably fulfilling its community caretaking function** when it entered, first, the

building owned by Martin, second, the first-floor apartment in that building and, third, the bedroom occupied by defendant and Taylor. Because the police were not lawfully on the premises, their invocation of the plain view exception to the warrant requirement as justification for seizure of the drugs found on the bedroom nightstand fails. (State v. Andre Scott, November 17, 2009; Michael Noriega, Designated Counsel)

Conviction reversed, suppression ordered by the Appellate Division. The primary issue presented by this appeal is whether flight from an unconstitutional investigatory stop that could justify an arrest for obstruction automatically justifies the admission of any evidence revealed during the course of that flight. Such **evidence is admissible only if there is a significant attenuation between the unconstitutional stop and the seizure of evidence and that commission of the offense of obstruction is insufficient by itself to establish significant attenuation.** The trial court correctly concluded that Officer Delaprida and his partner did not have a reasonable suspicion that defendant was engaged or about to engage in criminal activity. These police officers had been dispatched to the housing complex based on a report of a possible retaliatory shooting in the area. The officers admittedly did not have any prior contact with defendant and thus had no reason to believe he might be involved in the possible retaliatory shooting or other criminal activity. Moreover, defendant's conduct after he saw the officers enter the courtyard did not provide an objectively reasonable basis for suspecting that he had engaged in or was about to engage in criminal activity. Defendant simply started quickly pedaling away from the officers and put his hand in his pocket. This conduct arguably should not even be considered flight because the officers did not initially indicate to defendant that he should stop. Defendant could have believed that he should simply get out of the officers' way. Even if defendant's failure to obey Officer Delaprida's command to stop would have provided an adequate basis to arrest him for obstruction, the evidence obtained when Officer Delaprida and his partner grabbed defendant was not "sufficiently attenuated" from the taint of the unconstitutional stop to justify its admission into evidence. (State v. Robert E. Williams, November 29, 2009; Alyssa Aiello, A.D.P.D.)

#### **SENTENCING - MISCELLANEOUS**

The Appellate Division concluded that the sentencing judge mistakenly **exercised his discretion when he refused to sentence defendant as a third-degree offender**, reversed the sentence

imposed, exercised original jurisdiction, resentenced defendant as a third-degree offender, and remanded for entry of an amended judgment of conviction. Balancing the aggravating and mitigating factors, the mitigating factors substantially outweigh the aggravating factors. The high standard governing downgrading under State v. Megargel, 143 N.J. 484, 500 (1996), is met here. Compelling reasons exist for the downgrade. In addition to the mitigating factors, defendant is a person of very limited intelligence, functioning at a level in school initially below a five-year-old child and by the time of the crimes at the level of a six-year-old child. She struggled in school and was placed on special education programs. She has a severe language disorder and severe deficits in comprehension and syntax. She suffers from PTSD and Major Depressive Disorder. The circumstances surrounding her behavior were extreme and severe. She had been raped by her father repeatedly for years, causing impairment of her judgment and decision-making ability. She felt powerless toward her father and feared for her life and that of her mother. Her cognitive limitations impaired her ability to seek help with respect to the rapes and her pregnancies and affected her desire not to have her babies abused, and she was socially isolated by her abusive father. Her cultural and language barriers and her lack of assimilation into the community also prevented her from seeking help. The judge erred in refusing to sentence defendant as a third-degree offender." (State v. L.V., October 8, 2009; Mark Stalford, Designated Counsel)

#### **WITNESSES**

The Appellate Division reversed a conviction based on the mistaken admission of a material witness's videotaped deposition, even though defense counsel failed to object to this misapplication of Rule 3:13-2(c). The deposed witness was only absent from the State; he was not "unable to testify because of death or physical or mental incapacity," as required by Rule 3:13-2(c). Rule 3:13-2 defines what is meant by the unavailability of a material witness, requiring that the proponent establish that the witness has either died or is physically or mentally incapacitated. The Rule's incapacity element does not encompass a situation where the witness is healthy in mind and body but not physically present within the jurisdiction. As the State concedes, Khan "was the only witness that could testify that the defendant possessed the handgun" - a necessary element of the charged offense. Because defense counsel failed to object, Khan's deposition was heard by the jury despite the fact that Rule 3:13-2(c) did not permit its

use. (State v. Marcus Hollen, October 13, 2009; Rasheedah Terry, Designated Counsel)

Conviction reversed by the New Jersey Supreme Court. At trial, defendant did not contest the fact he killed his parents; his sole defense was diminished capacity, which was to be proved through his testimony about his drug consumption and depression, and that of his expert psychiatrist. During the trial, the trial judge injected himself into the case by questioning witnesses, including defendant and his expert. Because that questioning made it seem as though the judge did not credit the proffered defense, it denied defendant a fair trial. A judge has a right to question witnesses in a criminal trial, but that right is tethered to ensuring the fairness of the proceedings, to expedition, and to the clarification of ambiguities. None of those matters was at issue here. Here, the judge's questioning was gratuitous and evidenced incredulity with respect to defendant's only defense, along with support for the State's witness. The judge's repeated assurances to the jury that he was acting in the interest of justice with no purpose of aiding or hurting the prosecution or the defense rang hollow and were not sufficient to cure the harm. (State v. Peter J. O'Brien, December 29, 2009; Jay L. Wilensky, A.D.P.D.)